Supreme Court, U. S.
FILED
SEP 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1732

BETTY AGNEW,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General of North Carolina

WILLIAM F. O'CONNELL
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT: REASONS WHY THE WRIT SHOULD NOT BE GRANTED 4

1. The Opinion Of The Supreme Court Of North Carolina In Affirming The Trial Court's Denial, As To Two Counts, Of Petitioner's Motion For Judgment As Of Nonsuit Is Without Error And Violates No Constitutional Right Of The Petitioner 4

2. The Actions Of The Trial Court In Erroneously Ruling Upon Two Questions Propounded On Cross-Examination To A State's Witness Under A Misapprehension That They Dealt With Communications Which Were Privileged Under The Law Does Not Constitute A Violation Of Petitioner's Due Process Rights Of Confrontation And Cross-Examination, And The State Supreme Court Properly Applied State Law In Determining This Error Was Not Prejudicial 6

CONCLUSION 8

TABLE OF CITATIONS

CASES:

Chapman v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967) 7

Garner v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L. Ed. 2d 207 (1961) 5, 6

Moore v. *R. R.*, 173 N.C. 311, 92 S.E. 1 (1917) 4

Mullaney v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L. Ed. 508 (1975) 6

State v. *Satterfield*, 121 N.C. 558, 28 S.E. 491 (1897) ... 4

Stansbury, *North Carolina Evidence* (Brandis Revision) § 210 pp. 152, 153 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1732

BETTY AGNEW,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported in 294 N.C. 382, 241 S.E. 2d 684. The full text of the opinion appears in the Appendix to Petition beginning at page A-1.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. By *allegedly* using the "scintilla of evidence" standard in determining sufficiency of the evidence to be submitted to the jury, did the Supreme Court of North Carolina deprive petitioner of her due process right to be acquitted unless proven guilty beyond a reasonable doubt?

2. Did the Trial Court's limitation of cross-examination of a prosecution witness deprive petitioner of her due process right to confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV — Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

With the exceptions hereinafter set forth, respondent accepts and adopts the Statement of Case set forth in the Petition. Respondent's exceptions are as follows:

1. In the first full paragraph of page 4 of the Petition, petitioner, referring to the conclusion by the Supreme Court of North Carolina, that the evidence was sufficient to be submitted to the jury on two of the three charges against the petitioner, states, "In so doing, the majority relied on the 'scintilla of evidence' standard...." Respondent excepts to this statement as being incorrect and argumentative for the reasons set forth in its argument as to why the petition should be denied.

2. The first full sentence on page 5 of the Petition states that "Petitioner was seeking to show that among this witness' clients was the newspaper published by petitioner's chief critic and political foe." This self-serving statement as to what petitioner was seeking to show is not supported by the record and respondent excepts thereto.

The respondent would add the following to the Statement of the Case:

The Trial Court imposed a one-year sentence of imprisonment upon each of the three counts, to run concurrently. The execution of each sentence was suspended upon condition that the petitioner violate no laws for a period of two years and that she pay costs and pay fines as follows: false pretenses—$2,000; embezzlement—$2,000; and misapplication of public funds—$1,000.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE OPINION OF THE SUPREME COURT OF NORTH CAROLINA IN AFFIRMING THE TRIAL COURT'S DENIAL, AS TO TWO COUNTS, OF PETITIONER'S MOTION FOR JUDGMENT AS OF NONSUIT IS WITHOUT ERROR AND VIOLATES NO CONSTITUTIONAL RIGHT OF THE PETITIONER.

It should first be noted that, in spite of repeated statements by the petitioner to the effect that the North Carolina Supreme Court used a "scintilla of evidence rule" or "scintilla of evidence standard" the language of the Court which petitioner complains of is as follows:

> "Nonetheless, if *more than a scintilla of evidence* is presented to support the indictment, the case must be submitted to the jury." (Emphasis supplied) (Appendix to Petition p. A-5)

Further, this language does not state the full or ultimate inquiry which is required by the law of North Carolina and which applied here by the North Carolina Supreme Court in passing upon the sufficiency of the evidence to be submitted to the jury.

> "In passing upon the sufficiency of the evidence, the ultimate inquiry is whether it is such as might reasonably satisfy an impartial mind of the truth of the proposition sought to be proved." Stansbury, *North Carolina Evidence* (Brandis Revision) § 210 pp. 152, 153, citing *State* v. *Satterfield,* 121 N.C. 558, 28 S.E. 491 (1897) and *Moore* v. *R. R.,* 173 N.C. 311, 92 S.E. 1 (1917).

In its Opinion here, the North Carolina Supreme Court applied this "ultimate inquiry" in terms of what the jury reasonably could have found or inferred in its consideration of the sufficiency of the evidence to be submitted to the jury on both of the charges in which it affirmed the conviction. (Appendix to Petition pp. A—11 and A—14). This test having been applied, it is submitted that other words used in the majority and the dissenting opinions, to wit: "more than a scintilla of evidence" and "substantial evidence" become of secondary importance if not irrelevant. To a large extent, it is a distinction without a difference. It appears that the North Carolina appellate courts have never overruled the use of the phrase "more than a scintilla of evidence" although the term "substantial evidence" has more commonly been used in the more recent cases.

Petitioner's argument upon this point appears to confuse two entirely different rules. These are the rule to the effect that it is a violation of due process to convict a person without evidence of his guilt and the rule pertaining to the sufficiency of the evidence to support a conviction. When the former rule is applied, the inquiry does not turn upon the sufficiency of the evidence to support a conviction, but whether the conviction rests on any evidence which would support a finding that the petitioner committed the crime. *Garner* v. *Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L. Ed. 2d 207 (1961).

The Petition contains no mention of any element of either of the offenses in which the petitioner's conviction was affirmed by the North Carolina Supreme Court for which there was not some evidence. A reading of the Opinion of the North Carolina Supreme Court will show that there was such evidence.

This Court has held that it will not substitute its judgment for that of the state court's when it becomes necessary to analyze the evidence for the purpose of determining whether it supported the findings of the state court. *Garner* v. *Louisiana, supra.*

Petitioner cites the case of *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed. 2d 508 (1975), for the proposition that a rule of law placing the burden of proof on the defendant as to a fact necessary to constitute the crime charged deprived the defendant of due process. The respondent submits that this proposition cannot be related to the petitioner's challenge of the test applied by the state Supreme Court in passing upon the sufficiency of the evidence to be submitted to the jury. *Mullaney* does not prohibit the use of presumptions or permissible inferences. The instructions of the Trial Court to the jury concerning the burden of proof is not here in question. State courts have the final authority to interpret and, where they see fit, to reinterpret the laws of their state. *Garner* v. *Louisiana, supra.*

In summation, respondent respectfully submits that the North Carolina Supreme Court did not commit error under the law of the State of North Carolina in testing the sufficiency of the evidence to be submitted by the jury; that the petitioner was not convicted without evidence of her guilt; that neither the "proof beyond a reasonable doubt" rule nor the *Mullaney* proposition are applicable here; and assuming, arguendo, that it may have been preferable for the North Carolina Supreme Court to speak in terms of "substantial evidence" rather than "more than a scintilla of evidence", the petitioner has shown no violation of her due process rights by the Court's use of the latter term.

II. THE ACTIONS OF THE TRIAL COURT IN ERRONEOUSLY RULING UPON TWO QUESTIONS PROPOUNDED ON CROSS-EXAMINATION TO A STATE'S WITNESS UNDER A MISAPPREHENSION THAT THEY DEALT WITH COMMUNICATIONS WHICH WERE PRIVILEGED UNDER LAW DOES NOT CONSTITUTE A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS OF CONFRONTATION AND CROSS-EXAMINATION.

The questions upon which the Trial Court erroneously ruled, sustaining the State's objections, deal with whether the witness' accounting firm does accounting work for a certain newspaper and whether he was an officer of the newspaper corporation. (Appendix to Petition pp. A-16, A-17). Cousel for the petitioner apparently acquiesced in the Court's ruling that the law of privileged communication was applicable. After the Court sustained the prosecutor's objection to the question of whether the witness was an officer of the Washington Daily News Corporation, Mr. Wilkinson stated, "I want that in the record unless he claims privilege on that." When the witness indicated he did claim privilege, Mr. Wilkinson responded, "That is a matter of public record. No further questions." (Record p. 41). The North Carolina Supreme Court in holding that this was not prejudicial error notes that the Trial Court did not prohibit this entire line of questioning and that the petitioner's counsel failed to pursue it further. (Appendix to Petition p. A-17). It may be further noted that petitioner's counsel made no effort to introduce any public record into evidence, and, that during the course of a lengthy trial, no effort was made to correct the Trial Court's misapprehension of the law as to privileged communications.

Petitioner contends that the North Carolina Supreme Court did not apply the proper test in determining whether the Trial Court's error is prejudicial, contending that "...the absence of harm to the petitioner should have been established beyond reasonable doubt", relying upon *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967). That case pertains solely to errors involving denial of a federal constitutional right which was obviously not involved here.

> "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." *Chapman* v. *California, supra.*

Further, it is of importance to note that the Petition does not show that any constitutional question was raised in the State Courts with respect to either question raised here by the petitioner. To the best of the knowledge of the undersigned no such question was raised as an assignment of error in the Record on Appeal or in either of petitioner's briefs in the Court of Appeals and Supreme Court of this State.

CONCLUSION

For the reasons stated above, the respondent respectfully prays that this Court deny the petition.

This the 6th day of September, 1978.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of North Carolina

/s/ _____
WILLIAM F. O'CONNELL
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618

CERTIFICATE OF SERVICE

I hereby certify that I am Special Deputy Attorney General for the State of North Carolina; that I have served copies of the within ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing copies of same in the United States Mail at Washington, D.C., first class postage paid, addressed to:

Mr. Robinson O. Everett
Everett, Everett, Creech & Craven
301 First Union National Bank Building
Durham, North Carolina 27701

This 6th day of September 1978.

/s/ _____
WILLIAM F. O'CONNELL
Special Deputy Attorney General

COUNSEL FOR THE STATE OF NORTH CAROLINA, RESPONDENT